

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GRANVILLE S. MYER	:	DETERMINATION
D/B/A SCOTTY'S GARAGE	:	
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the period 1982 through 1984.	:	

Petitioner, Granville S. Myer d/b/a Scotty's Garage, 2021 Blue Mountain Road, Saugerties, New York 12477, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period 1982 through 1984 (File No. 802564).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, W.A. Harriman State Office Building Campus, Albany, New York on December 7, 1987 at 1:15 P.M., continued at the same offices on July 18, 1988 at 1:15 P.M. and concluded at the same offices on August 9, 1988 at 10:00 P.M. with all briefs to be filed by December 7, 1988. Petitioner appeared by Edward J. Carroll, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Arnold Glass, Esq., of counsel).

ISSUES

I. Whether petitioner substantiated that he is entitled to a refund of sales and use taxes in excess of the amount conceded by the Division of Taxation.

II. Whether any portion of the refund claimed is barred by the statute of limitations.

FINDINGS OF FACT

Petitioner, Granville S. Myer d/b/a Scotty's Garage, operated a gasoline station which provided automotive repairs. On or about November 19, 1984, petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax for the period "1982 through present". The application stated that he overpaid sales tax in the amount of "\$15,000.00 (+)" and that he had been denied access to all documents, records and books in the possession of the Division of Taxation ("Division").

On June 17, 1985, the Division advised petitioner that his claim for refund was denied because on two occasions petitioner failed to substantiate the claim.

On or about September 18, 1985, petitioner filed a petition seeking a refund of sales and use taxes in the amount of \$21,061.78. In order to substantiate this claim, petitioner attached a schedule to the petition which compared the amounts he claimed to have paid from December 1972 through December 1984 with amounts which were reported due on sales and

use tax returns during same the period.

Upon review of the material presented, a Tax Appeals Bureau conferee concluded that petitioner was entitled to a refund of \$1,317.16. The Division generally agreed with the conferee's calculations except for overpayments which were made on, respectively, April 16, 1981 and August 31, 1981. It was the Division's position that petitioner was not entitled to a refund of these overpayments because the statute of limitations expired on September 1, 1981. Therefore, the Division maintained that petitioner was entitled to a refund of tax of \$707.16. At the hearing, the Division acknowledged that, due to an error on its part, petitioner was entitled to a refund of an additional \$60.00 beyond the \$707.16 previously agreed to.

In arriving at the amount of the refund, the conferee noted that the amount due on certain returns was paid well after the period to which it applied. For example, the following returns and associated payments were noted:

Return for Period <u>Ended</u>	Date of <u>Payment</u>
February 28, 1977	April 16, 1981
May 31, 1977	December 5, 1981
August 31, 1977	October 8, 1981
November 30, 1977	July 23, 1982
November 30, 1978	November 26, 1982 ¹

1

The conferee's notes show that the payment on November 26, 1982 resulted in an overpayment of \$2.33.

When determining the amount of the refund which should be given to petitioner, the Division declined to give petitioner credit for certain payments because it was determined that the payments were applied to income tax or withholding tax liabilities.

The dates and amounts of these checks are as follows:

<u>Date of Check</u>	<u>Amount</u>
January 23, 1979	\$ 50.00
September 12, 1979	48.80
May 7, 1981	50.00
May 15, 1981	100.00
February 18, 1982	350.00
April 29, 1982	50.00
June 11, 1982	30.00
June 18, 1982	50.00

There is no evidence that petitioner specifically directed that any of the foregoing payments be applied to a sales tax liability.

Upon review of a list of checks provided by petitioner, the Division declined to give credit for checks dated September 18, 1978 and December 19, 1978 in the amounts of, respectively, \$1,253.14 and \$1,205.14, because the Division could not find payments which corresponded with these amounts.

At the hearing, petitioner presented a series of documents for the purpose of establishing

that he is entitled to a greater refund than that conceded by the Division. These documents will be discussed seriatim:

a) Petitioner presented a cancelled check dated June 20, 1978 on his account at Chase Manhattan Bank. The check, which was drawn in the amount of \$1,180.27, had markings indicating that it was returned because petitioner's account had insufficient funds. The check contained the handwritten notation "Cleared July statement". However, a copy of a bank statement showing that the check was honored was not offered into evidence.

b) Petitioner offered a cancelled check dated December 20, 1979 payable to the order of "New York State Sales Tax" in the amount of \$2,248.90. Handwritten notations on the check show that the check was for a sales tax return and the amount of the check corresponded with the amount of sales and use tax shown due on petitioner's tax return for the quarterly period ended November 30, 1979. Stamps on the checks indicated that the check was returned for insufficient funds and the testimony presented by the Division was that this check was not applied to petitioner's tax liability because the check was not honored by petitioner's bank. However, a bank statement from petitioner's bank reveals that this check was honored.

c) Petitioner offered a cancelled check dated June 21, 1980 payable to the order of "New York State Department of Taxation and Finance" in the amount of \$2,015.23. A notation on the check indicated that the check was for an ST-100 which is the designation of a sales and use tax return. The amount of the check corresponded with the amount of tax shown due on petitioner's sales and use tax return for the quarterly period ended May 31, 1980. Markings on the check, from a bank, state that the check was returned for insufficient funds and evidence presented by the Division establishes that this check was not applied to any of petitioner's tax liabilities. Nevertheless, a bank statement from petitioner's bank reveals that this check was honored.

d) Petitioner submitted a check dated March 20, 1982 payable to the order of the "New York State Department of Taxation and Finance" in the amount of \$1,169.76. A notation on the check stated that it was for "ST-100" and the amount of the check corresponded with the amount of tax which the taxpayer reported was due for the quarterly period ended February 28, 1982. The Division did not take this payment into consideration in determining the amount of petitioner's refund because it could not find where the payment was credited. A document entitled "schedule of returns filed", which was generated by the Division's computer reveals that this check was received in conjunction with petitioner's return for the quarterly period ended February 28, 1982.

e) Petitioner presented a check dated June 18, 1982 payable to New York State Sales Tax in the amount of \$265.55. A notation on the check stated that the check was for "March 1, 1982 through May 31, 1982". The Division did not give petitioner credit for the check because it could not ascertain how the check was applied. A bank cancellation on the check establishes that the check was honored.

f) Petitioner submitted a check dated December 15, 1982 payable to the order of the "New York Department of Taxation and Finance" in the amount of \$200.00. The check contained the notation that it was for "122-123-124-125". The Division did not give petitioner credit for the check because the payment was not applied to sales tax.

g) Petitioner presented a savings withdrawal slip in the amount of \$725.78 payable to "New York State Department of Taxation and Finance" authorizing a withdrawal from an account at the State Bank of Albany. Petitioner also presented a series of four bank statements from the State Bank of Albany which reported the following withdrawals from an account entitled New York State Business Tax Escrow Plan:

<u>Date</u>	<u>Amount</u>
September 20, 1982	\$725.78
October 4, 1982	145.00
November 23, 1982	263.17
December 31, 1982	500.00

The Division did not give petitioner credit for any of these withdrawals since it could not establish that these funds were applied to sales tax. The Division also declined to give petitioner credit for a withdrawal of \$1,050.00 on an account at the State Bank of Albany for the same reason.

h) Petitioner offered a copy of a bank check dated September 15, 1983 payable to the New York State Department of Taxation and Finance in the amount of \$1,237.00. This check was taken into account in computing the amount of petitioner's refund.

i) Petitioner submitted a bank check dated September 15, 1983 payable to the Department of Taxation and Finance in the amount of \$905.00. This check was also considered in determining the amount of the refund which the Division agreed to.

j) Petitioner presented a check dated November 9, 1983 payable to the Department of Taxation and Finance in the amount of \$500.00. Markings on the check indicate that the check was to be applied to sales tax liability for the periods ending February 28, 1980 and November 30, 1980 through November 30, 1981. Although an auditor was unable to state at the hearing whether petitioner was given credit for the payment, a review of the notes made by

the auditor on a worksheet prepared by petitioner reveals that the Division recognized this payment as being applied to the amount due for the quarterly period ended November 30, 1978.

k) Petitioner offered a check dated December 12, 1983 payable to the Department of Taxation in the amount of \$932.78. A notation on the check indicated that the check was remitted pursuant to a deferred payment agreement and that the payment was for the period ended November 30, 1981. Handwritten notations by an auditor on a worksheet prepared by petitioner reveal that the Division was aware of this payment and that the payment was also applied to the sales tax period ended November 30, 1978.

l) Petitioner presented a Certified Check Voucher dated January 20, 1984 establishing that on January 27, 1984 petitioner had a certified check prepared in favor of the Department of Taxation and Finance. There are no inscriptions on the certified check voucher stating that it was remitted in order to satisfy a particular liability. Moreover, handwritten notations by the auditor on a worksheet prepared by petitioner show that petitioner did not get credit for this check in order to determine the amount of the refund because the payment was not applied to a sales tax liability.

m) Petitioner presented a cancelled check dated June 20, 1984 payable to the Department of Taxation and Finance in the amount of \$347.69. The check contained the notation that it was for the sales tax period March 1, 1984 through May 31, 1984. A check mark by the Division's auditor on a worksheet prepared by petitioner shows that credit was given for this payment.

n) Petitioner presented a series of checks which contained memoranda indicating that the payments were for certain sales tax periods. These checks bore the following dates and amounts:

<u>Date</u>	<u>Amount</u>
December 20, 1983	\$723.96
March 19, 1984	429.59
September 17, 1984	139.64
December 20, 1984	381.77

Check marks by the Division's auditor on petitioner's worksheet show that each of these checks was considered by the Division when it determined the amount of the refund it was willing to grant petitioner.

o) Petitioner offered a series of worksheets which listed, among other things, the sales tax reportedly due on returns from December 1972 through December 1984. Subsequent columns on the return attempted to correlate petitioner's tax payments with the amounts shown due on the returns. No attempt was made to account for the imposition of penalty and interest which would normally arise from the late filing and payment of sales tax liabilities.

From 1975 through 1980 petitioner made sales tax payments between sales tax quarters. He also made some quarterly payments. In 1979 petitioner entered into a verbal agreement with the Division to make payments on his outstanding liabilities. By 1982, petitioner "felt" that he was current in meeting his sales tax obligations. However, petitioner continued making payments and started inquiring about what was being done with the money he was paying. Although there were numerous meetings, petitioner never received a precise explanation of where the monies were being applied. In 1983, petitioner entered into a deferred payment agreement with respect to those returns which were filed without remittance. In the summer of

1984, tax compliance officers padlocked the doors of petitioner's business and demanded payment of \$19,100.00 in satisfaction of certain warrants. Petitioner insisted that he did not owe the money. Nevertheless, he relented and paid the money under protest in order to reopen his business. The Division applied the \$19,100.00 as follows:

<u>Quarter Ending</u>	<u>Amount</u>
February 28, 1979	\$1,733.35
February 29, 1980	3,449.64
November 30, 1980	3,393.49
February 28, 1981	3,340.01
May 31, 1981	1,932.59
August 31, 1981	2,825.07
November 30, 1981	<u>2,426.05</u>
	\$19,100.20

At some juncture, petitioner established a tax escrow account in order to satisfy sales tax obligations at the behest of an employee of the Division. When the account was first established, petitioner executed withdrawal slips in order to make withdrawals from the account. This practice continued through at least September 14, 1982. Petitioner's recollection is that at some point in time he ceased receiving withdrawal slips. Petitioner believes that thereafter the Division made withdrawals from the account without any activity on his part.

SUMMARY OF PETITIONER'S POSITION

Petitioner submits that the checks marked insufficient funds were honored by his bank and evidenced by bank statements. Moreover, since he is in possession of the check, it may be inferred that the check cleared because, if the check had not been honored, it would not have been returned to him. Petitioner contends that this argument is buttressed by the Division's being in possession of other checks which were not honored by the bank. Petitioner also argues that he did not have any employees and therefore the application of any payments to withholding tax was improper. Petitioner submits that the worksheet described in Finding of Fact "8(o)" establishes that he made an overpayment of \$22,300.45.

CONCLUSIONS OF LAW

A. It is a well settled principle that in the absence of any direction from the debtor, a creditor may allocate payments among debts owing in any manner the creditor wishes (see, First National Bank in Palm Beach v. United States, 591 F2d 1143 [5th Cir 1979]; Matter of Farkas, Tax Appeals Tribunal, October 14, 1988). However, this discretion is not unfettered . The creditor must allocate payments to debts due and owing as opposed to debts which have not yet become due (First National Bank in Palm Beach v. United States, supra; see Matter of Farkas, supra).

The due date for a tax liability depends upon the particular tax involved. Thus, income taxes are due and owing on the due date of the return (see, First National Bank in Palm Beach v. United States, supra). However, penalties and interest are not payable until there has been an assessment (Matter of Farkas, supra). This prerequisite arises because of the statutory proviso

that interest is payable "upon notice and demand" (Tax Law § 684[g]).

Sales tax liabilities are also due and payable on the due date of the return (Tax Law § 1137[a]). However, unlike the corresponding income tax provisions, there is no requirement that a particular document be issued prior to a liability for penalties and interest (see, Tax Law § 1145[a][former(3)]). Therefore, it is concluded that sales tax penalties and interest may be collected without the need for an assessment.

When applying the foregoing principles one must further consider that the burden of proof is on the taxpayer to show that he is entitled to credit for a particular check since he initiated the proceeding (State Administrative Procedure Act § 306.1).

Before considering the specific evidence presented, there is one additional factor. In order to obtain a refund of sales tax under the circumstances presented herein, the petitioner must submit the application therefor within three years of the date which has been prescribed for the payment of tax (Tax Law § 1139[a]). Therefore, since petitioner's claim for refund was made on November 19, 1984, petitioner may seek a refund for payments made for the sales tax quarter September 1, 1981 through November 30, 1981 and thereafter.

B. Applying the principles set forth above leads to the following conclusions:

1) Petitioner has not sustained his burden of proof of establishing that the Division erred by not giving him credit for the payments set forth in Finding of Fact "6". Petitioner has not shown that he directed any of these payments to satisfy sales tax liabilities. Moreover, on the record presented, it can not be said that the application of these payments to income tax obligations was erroneous. Although, petitioner may not have had employees, petitioner may

have had income tax liabilities justifying the application of these payments to said liabilities.

2) Petitioner is not entitled to credit for the checks described in Finding of Fact "7". First, petitioner has not established that these checks were drafted to satisfy sales tax obligations. Secondly, since these checks were dated in 1978, they were clearly not for obligations payable for the sales tax quarter September 1, 1981 through November 30, 1981 or thereafter. Therefore, a refund on these payments is barred by the statute of limitations.

3) As previously noted, the statute of limitations bars refunds for payments of liabilities payable prior to the sales tax quarter September 1, 1981 through November 30, 1981. In view of the dates of the checks, the payments described in Findings of Fact "8(a)", "8(b)" and "8(c)" were obviously for liabilities arising prior to the quarter ended November 30, 1981. Therefore, the statute of limitations is a bar to a refund for these quarters.

4) Petitioner is entitled to have the amount of his refund increased by the amount of the checks described in Findings of Fact "8(d)" and "8(e)". Each of the checks were honored by petitioner's bank and contained a directive that the checks should be applied to a sales tax liability. Moreover, the fact that the Division can not ascertain where a check was applied should not inure to petitioner's detriment.

5) Petitioner is not entitled to credit towards his refund for the payments described in Finding of Fact "8(f)", "8(g)", and "8(l)" since petitioner has not established that he directed that said payments be applied to sales tax.

6) Petitioner is not entitled to additional credit for the payments described in Finding of Fact "8(h)", "8(i)", "8(m)" and "8(n)" since he has already received credit for these payments.

7) Petitioner is entitled to be given credit for the payments described in Findings of Fact "8(j)" and "8(k)". It is incongruous for the Division to present a calculation showing that petitioner satisfied his liability for the tax period ended November 30, 1978 on November 26, 1982 (Finding of Fact "5") and then take the position that subsequent payments were also used to satisfy petitioner's liability for the same period. Inasmuch as each check contained a sufficiently clear directive that they be applied to a sales tax liability and, further, that they be applied to periods not barred by the statute of limitations, petitioner is entitled to be given credit for the checks set forth in Findings of Fact "8(j)" and "8(k)".

8) The worksheet described in Finding of Fact "8(o)" does not establish the amount of the refund to which petitioner is entitled since it does not take into account the penalties and interest which accrue, as a matter of course, from petitioner's periodic delays in remitting tax when due (see, Conclusion of Law "A").

C. The Division is directed to give petitioner the benefit of the refund acknowledged at the hearing (Finding of Fact "4").

D. The petition of Granville S. Myer d/b/a/ Scotty's Garage is granted to the extent of Conclusions of Law "B(4)", "B(7)" and "C" and the overpayments are to be refunded together with such interest as may be lawfully due and owing, and except as so granted the petition is in all other respects denied.

DATED: Troy, New York

June 8, 1989

/s/ Arthur S. Bray

ADMINISTRATIVE LAW JUDGE